



6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 70**

**[EPA-R03-OAR-2015-0594; FRL-9942-12-Region 3]**

**Clean Air Act Title V Operating Permit Program Revision; West Virginia**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is approving a revision to the Title V Operating Permits Program (found in West Virginia's regulations at 45CSR30) submitted by the State of West Virginia. The revision increases West Virginia's annual emission fees for its Title V Operating Permit Program to \$28 per ton of emissions of a regulated pollutant from an individual source subject to the West Virginia Title V Operating Permit Program. EPA is approving the revision to West Virginia's Title V Operating Permit Program in accordance with the requirements of the Clean Air Act (CAA).

**DATES:** This final rule is effective on **[insert date 30 days after date of publication in the Federal Register]**.

**ADDRESSES:** EPA has established a docket for this action under Docket ID Number EPA-R03-OAR-2015-0594. All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available through [www.regulations.gov](http://www.regulations.gov) or may be viewed during normal business hours at the

Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the West Virginia Department of Environmental Protection, Division of Air Quality, 601 57th Street SE, Charleston, West Virginia 25304.

**FOR FURTHER INFORMATION CONTACT:** Paul Wentworth, (215) 814-2183, or by e-mail at [wentworth.paul@epa.gov](mailto:wentworth.paul@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

On October 5, 2015 (80 FR 60110), EPA published a notice of proposed rulemaking (NPR) for the State of West Virginia. In the NPR, EPA proposed approval of a revision to the West Virginia Title V Operating Permit Program. The formal program revision was submitted by the State of West Virginia on June 17, 2015.

### **II. Summary of Title V Operating Permit Program Revision**

In the June 17, 2015 program revision submittal, West Virginia included revisions to 45CSR30.8 to increase West Virginia's annual emission fees for its Title V Operating Permit Program. West Virginia increased the annual fees to \$28 per ton of emissions of a regulated pollutant from an individual source subject to the West Virginia Title V Operating Permit Program. The previous rate in 45CSR30.8 was \$18 per ton of regulated pollutant. This revised fee per ton became effective on May 1, 2015 and replaced the prior fee, \$18 per ton, which was effective July 1,

1995 through April 30, 2015.<sup>1</sup> As discussed in the NPR, without this fee increase, West Virginia anticipated that funds would not be sufficient to sustain its Title V Operating Permit Program in a manner consistent with state and federal requirements. In the NPR, the EPA proposed to approve the revision increasing annual Title V fees that the owners or operators of Title V facilities in West Virginia must pay pursuant to 45CSR30.8. The EPA explained that the revision met requirements in section 502 of the CAA and 40 CFR 70.9 for the collection of sufficient Title V fees to cover permit program implementation and oversight costs. The emission fees apply to emissions up to 4,000 tons of any regulated pollutant. However, the EPA's NPR inadvertently misstated that the revision to 45CSR30.8 would increase fees to \$25 per ton of regulated pollutant, rather than the correct figure of \$28 per ton of regulated pollutant. This error in the NPR by the EPA was inadvertent and does not affect the rationale for the EPA's proposed approval of the Title V permit fee increase as the EPA's evaluation for the NPR was based on 45CSR30.8 which provided for the increase to \$28 per ton of regulated pollutant emitted.<sup>2</sup>

Other specific requirements of the program revision and the rationale for the EPA's proposed action are explained in the NPR and will not be restated here.

### **III. Comments and EPA's Responses**

**Comment:** The EPA received one comment during the public comment period on the proposed approval of the revision to West Virginia's Title V Operating Permit Program. The comment

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<sup>1</sup> On July 1, 1995, the \$18 per ton fee replaced West Virginia's Title V operating permit "transition fee" of \$15 per ton emitted from a source which had previously been in effect for the Title V Operating Permit Program.

<sup>2</sup> In fact, the additional three dollars per ton of regulated pollutant emitted by sources provides additional funds to support the implementation of West Virginia's permit program for Title V of the CAA in accordance with requirements in the CAA and in 40 CFR 70.9.

was submitted on behalf of the West Virginia Department of Environmental Protection (WVDEP). In the comment letter, the WVDEP noted that the new fee provisions contained in the revision to 45CSR30 as part of WVDEP's June 17, 2015 submission to EPA was \$28 per ton of regulated pollutants as emitted by individual sources subject to the West Virginia Title V Operating Permit Program. The WVDEP noted that the EPA's NPR incorrectly stated the new fee per ton of regulated pollutant emitted was \$25 instead of \$28 per ton emitted.<sup>3</sup>

**Response:** The EPA appreciates WVDEP's comment and acknowledges it inadvertently stated in the NPR that the annual fee per ton of regulated pollutant emitted for an individual source subject to the West Virginia Title V Operating Permit Program was increased to \$25 per ton of regulated pollutant emitted. WVDEP correctly noted in its comments that 45CSR30.8 increased the fee for emissions to \$28 per ton of regulated pollutant emitted from a Title V source. This increase from \$18 per ton to \$28 per ton of regulated pollutant emitted was effective on May 1, 2015. WVDEP's June 17, 2015 submittal of the revised 45CSR30.8 to the EPA correctly indicated the new fee per ton of regulated pollutant emitted was \$28. EPA evaluated the Title V program revision after reviewing 45CSR30.8 and evaluating the permit fee increase at \$28 per ton emitted. The EPA's error in the NPR in incorrectly referring to new fees of \$25 per ton emitted was inadvertent and did not affect our analysis or proposed conclusion that the permit fee revision met requirements in the CAA for Title V permit programs.

The WVDEP comment letter corrects the EPA's error and clarifies that the correct fee per ton of

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<sup>3</sup> The WVDEP also corrected background information presented in the NPR about historical Title V Operating Permit Program fees in West Virginia. Specifically, WVDEP noted that the \$18-per-ton fee was not the "initial" fee established in 1994. The program initially had a \$15-per-ton transition fee, which was replaced effective July 1, 1995 by the \$18-per-ton fee that has been effective until recently. The EPA thanks WVDEP for this clarification, which did not affect our analysis or proposed conclusion that the permit fee revision met CAA requirements for the Title V permit programs.

regulated pollutant emitted by a Title V permitted source is \$28 per ton. As noted previously, the revision to 45CSR30.8 increasing the permit fee from \$18 per ton to \$28 per ton of regulated pollutant emitted meets requirements in section 502 of the CAA and 40 CFR 70.9 for the collection of sufficient Title V fees to cover permit program implementation and oversight costs. The EPA's determination that West Virginia's Title V Operating Permit Program continues to meet obligations to collect sufficient fees to implement its Title V program is not altered by our inadvertent reference to \$25 per ton of regulated pollutant emitted instead of \$28 per ton emitted as our analysis was based on the revised 45CSR30.8 which listed the correct fee as \$28 per ton.

The EPA also finds no further comment period is needed to address the inadvertent reference to the per ton fee increase. The EPA's finding that the revised fees in 45CSR30.8 meet requirements in section 502 of the CAA and 40 CFR 70.9 was explained in the NPR, and the specific finding that the \$28 per ton meets requirements for Title V permit fees to fund a Title V program is a logical outgrowth of the proposed rule. No additional notice or opportunity to comment is necessary where, as here, the final rule is "in character with the original scheme," and does not "substantially depart [] from the terms or substance" of the proposal. *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098 (4th Cir. 1985). "[A] final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commentators with their first occasion to offer new and different criticisms which the agency might find convincing." *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (citation and internal quotation marks omitted).

Notwithstanding the NPR's erroneous description of the revised fee being \$25 per ton of

regulated pollutant, the EPA's determination about the sufficiency of this fee was in fact based on our evaluation of the slightly larger \$28-per-ton fee. The NPR also cited the correct provision of West Virginia law, which also would have confirmed to potential commenters that the state's proposed fee increase was to \$28 per ton. The docket similarly included information clarifying that the proposed revision would increase certain fees to \$28 per ton of regulated pollutants.<sup>4</sup>

Accordingly, a supplemental notice clarifying the per-ton fee would not provide any commentators with a first occasion to offer any new or different criticisms of WVDEP's Title V permit fees. Nor would any such criticism convince EPA to alter our conclusion. As stated in the NPR, WVDEP found its permit fee of \$18 per ton was insufficient to allow adequate implementation of its Title V Operating Permit Program. After internal analysis, WVDEP concluded it needed the additional revenue from permit fees at \$28 per ton emitted to fund sufficiently its Title V Operating Permit Program, and EPA concurs with that conclusion. Further opportunity for comment would not provide any opportunity for criticism of West Virginia's new permit fee which the EPA would find convincing. Thus, our approval of West Virginia's Title V Operating Permits Program including the revision to 45CSR30.8 is final as a "logical outgrowth" of the proposed approval announced in the NPR.

#### **IV. Final Action**

EPA is approving the June 17, 2015 Title V Operating Permit Program revision submitted by the State of West Virginia to increase Title V permit fees paid by owners or operators of Title V sources in West Virginia from \$18 per ton of regulated pollutant emitted to \$28 per ton of

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<sup>4</sup> To take just one example, the docket included a copy of the rule clearly showing that the revision was to \$28 per ton. *See* EPA-R03-OAR-2015-0594-0006 at 53 (showing relevant changes to West Virginia's rule).

regulated pollutant emitted. The revision meets requirements in section 503 of the CAA and of 40 CFR 70.9.

## **V. Statutory and Executive Order Reviews**

### **A. General Requirements**

This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule related to West Virginia's Title V fees does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the program is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

## **B. Submission to Congress and the Comptroller General**

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

## **C. Petitions for Judicial Review**



Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[Insert date 60 days after date of publication in the Federal Register]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action which approves the June 17, 2015 program revision submittal by the State of West Virginia as a revision to the West Virginia Title V Operating Permits Program may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### **List of Subjects in 40 CFR Part 70**

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 28, 2016.

Shawn M. Garvin,  
Regional Administrator,  
Region III.

## **PART 70--STATE OPERATING PERMIT PROGRAMS**

1. The authority citation for part 70 continues to read as follows:

**Authority:** 42 U.S.C. 7401, *et seq.*

2. Appendix A to part 70 is amended by adding paragraph (g) to the entry for West Virginia to read as follows:

### **Appendix A to Part 70--Approval Status of State and Local Operating Permit Programs**

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#### **West Virginia**

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(g) The West Virginia Department of Environmental Protection submitted a program revision on June 17, 2015; approval effective on May 1, 2015.

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[FR Doc. 2016-02831 Filed: 2/11/2016 8:45 am; Publication Date: 2/12/2016]